Jordan J. in the said judgment states as follows: —

"The general rule as to *mens rea* is clear and plain. It is a well established rule of the common law that an act is not criminal unless it is the product of a guilty mind. Thus, *mens rea* has two elements: (1) a mind; (2) which is guilty. The first is always essential.... Assuming his mind to be sufficiently normal for him to be capable of criminal responsibility, it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his knowledge of the presence of some essential factual ingredient of the crime charged. In principle, the rule of the common law is just as applicable to acts which are criminal because prohibited by statute, as to those which are offences at common law; and it was said by Cave J., in *R.* v. *Tolson* [(1889), 23 Q.B.D. 168, at p. 181] that it is so applicable unless excluded expressly or by necessary implication."

In the local case of *Lim Boon Hong and Tan Koon Yee* v. *Public Prosecutor*[6] (Penang Criminal Appeal Case No. PG. 34/67) his Lordship Justice H.S. Ong to whom the case of *Frailey* v. *Charlton, supra,* was cited said:

"I feel I must however follow the trend in our own courts (although before a single judge) where when proof of *mens rea or knowledge is essential to a conviction this is specifically stated* in the section or paragraph. I am not entitled to construe the legislation other than as it has been enacted in the absence of ambiguity and accordingly I hold that under section 131(1)(a) an *intent to defraud* the Government of any duties thereon, or to evade any of the provisions of this Ordinance or to evade any prohibition applicable to such goods is not required." (the emphasis is mine).

While I have the highest regard for the views of my brother Ong F.J., on the law to my mind such a legalistic approach without reservation could lead to the conviction and punishment of persons who are in the particular circumstances of a case totally blameless, a situation which would be total anathema to the principles of criminal jurisprudence and the tenets of criminal justice. This is the very mischief which both Lord Reid in *Sweet* v. *Parsley, supra,* and the High Court of Australia in *R.* v. *Turnbull, supra,* thought necessary to avoid.

In the present case the President was quite right in calling for the defence at the end of the prosecution case as to use the reasoning of the Australian High Court decision, the prosecution having proved that the appellants were concerned in importing prohibited goods, the "mind" part of intention, a *prima facie* case had been made out against the appellants.

But once the appellants submitted their defence, that they had no knowledge of the prohibition, then the court on the balance of probabilities should have considered whether the appellants had in importing the goods a "mind which was guilty". It is an age-old maxim that ignorance of the law is no defence but at the same time it would be contrary to principles of justice to convict an innocent person. I am fully aware of the dangers of allowing a defence of lack of knowledge of the law to be accepted and a bare statement to that effect should not suffice in the courts. But if on consideration of all the facts and circumstances of the case the court is satisfied of the "innocent mind" of an accused person, then the court should be entitled to take cognizance of it and act accordingly. In this case first and foremost the appellants were not importing goods which were inherently harmful to society or were of such a nature that they should have been put on their guard and made inquiries as to the lawfulness of their importation. If they were importing drugs, or arms or explosives, then a plea of ignorance of the law would not avail. The appellants' suppliers were from West Germany and it was through them that the pianos were imported from South Africa. From the outset the appellants made no attempt to conceal the fact that the country of origin of the pianos was South Africa. Permission was given by the Foreign Exchange Control to remit money for payment of these goods. In the Customs Declaration they also made no attempt to conceal the country of origin. In fact the Customs authorities collected the duty on them and released the goods. If the principle of "innocent minds" is to be totally cast aside, it could then even be argued that the Exchange Control and the Customs authorities had abetted the offence. But such an approach would make a mockery of law and justice.

For the reasons given above I would allow the appeal and set aside the conviction and sentence. The fine paid by the appellants shall be refunded to them.

As far as the goods are concerned, as their importation is totally prohibited, they shall remain confiscated to the authorities and the loss suffered by the appellants thereby would be a sufficient price to pay for their ignorance of the law. What the authorities do with the goods is not the concern of the courts but one cannot help but conjecture that to destroy the goods would be tantamount to gross waste of valuable assets which could contribute to the development of musical talent in the country but at the same time to auction them to the public would be to permit prohibited goods to be sold in the country.

Order accordingly.

Solicitors: *Lim Ewe Hock.*

CHAN SIEW KIM v. WOI FUNG SHENG TIM MEDICAL STORE & ANOR.

[O.C.J. (Abdoolcader J.) November 30 and December 5, 1977]

[Ipoh — Originating Motion No. 10 of 1976]

Administrative Law — Certiorari — Application to quash order of Appeal Board in respect of quantum of compensation awarded to tenant under provision of s.18 of the Control of Rent Act, 1966 — Privative or ouster clause as opposed to mere finality — Manifest defect of jurisdiction — Control of Rent Act, 1966, ss. 15(1), 16(1)(j) & 18(2).

Landlord and Tenant — Controlled premises — Recovery of possession for purposes of development — Compensation — Subtenant of part of premises entitled to — Tenant receiving from subtenants rents exceeding in the aggregate by more than 10% the rent of whole premises — No prohibition per se and did not render such sub-tenancy illegal — Control of Rent Act, 1966, ss. 15(1), 16(1)(j) and 18(2).

Interpretation — Meaning of 'jurisdiction', 'defect of jurisdiction' and 'manifest'.

In this case the applicant sought an order of *certiorari* to quash the decision made on February 7, 1976 by the Appeal Board in respect of the quantum of compensation awarded to the tenant and a subtenant of the premises in question under the provisions of section 18 of the Control of Rent Act, 1966. The applicant as owner of the premises had applied to the Rent Tribunal for the Sub-District of Ulu Kinta for the recovery of possession thereof for the purpose of development under the provisions of section 18 of the Act and had joined the respondents herein, who were the tenant and a subtenant respectively. The Rent Tribunal made an order in terms of the application for the recovery of possession and awarded compensation on the basis of a total of four years' rental payable by the first respondent as tenant of the whole premises. The first and second respondents were dissatisfied with the quantum of compensation awarded and appealed to the Appeal Board against that part of the order of Rent Tribunal. The Appeal Board on February 7, 1976 allowed the appeal and varied the order of the Rent Tribunal awarding compensation in the sum of $7,680 to the first respondent and $8,640 to the second respondent being an award on the basis of 4 years' rental payable by each of them. The applicant complained that the order of the Appeal Board was wrong in law and applied for *certiorari* to have it quashed on two grounds:—

(1) that the maximum amount that the applicant would be required to pay as compensation under section 18(2)(a) of the Act is only four years' rental based on the rent payable by the first respondent to the applicant as tenant of the premises at $160 per month and which would accordingly amount to no more than $7,680;

(2) that the Appeal Board was wrong in law in ordering payment of compensation to the second respondent in the sum of $8,640 as such order amounts to approval of what is prohibited under the provisions of section 16(1)(j) of the Act.

Held: (1) section 15(1) of the Control of Rent Act, 1966 which provides that any decision made by the Appeal Board shall be final and shall not be questioned in any court is a privative or ouster clause as opposed to mere finality, and *certiorari* would notwithstanding issue in the face of such a privative clause but only for a manifest defect of jurisdiction in the authority that made the order or for manifest fraud in the party procuring it.

Mak Sik Kwong v. *Minister of Home Affairs, Malaysia (No. 2)*[1] followed and applied.

Observations on the meaning of 'jurisdiction', 'defect of jurisdiction' and 'manifest'.

(2) a subtenant of a part of controlled premises against whom an order is made under section 18 of the Control of Rent Act is entitled to an award of compensation under section 18(2) on the basis of the rental payable by him in respect of his subtenancy;

(3) the Rent Tribunal has no jurisdiction under section 18 to make any apportionment of the rent of the whole premises or of an award of compensation thereunder between the tenant and subtenant or subtenants;

(4) the second limb of section 16(1)(j) of the Control of Rent Act which gives the landlord a ground for possession against his tenant where the latter receives from his subtenant or subtenants rents exceeding in the aggregate by more than 10 per centum the rent of the whole premises is not a prohibition *per se*, and does not render any such subtenancy or the rent payable in respect thereof illegal, and does not preclude an award of compensation under section 18 of the Control of Rent Act to a subtenant on the basis of the rent payable by him to the tenant which exceeds the amount specified therein;

(5) there was accordingly no manifest defect of jurisdiction and *certiorari* did not therefore lie.

Case referred to:-

(1) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175, 179.

ORIGINATING MOTION.

M. Sivalingam for the applicant.

Dato Liew Why Hone for the 2nd respondent.

Abdoolcader J.: Chan Siew Kim, in an aftermath of proceedings instituted by her for the recovery of possession of premises No. 71, Leech Street, Ipoh, seeks an order of *certiorari* to quash the decision made on February 7, 1976 by the Appeal Board constituted under the provisions of section 15 of the Control of Rent Act, 1966 in respect of the quantum of compensation awarded to the tenant and a subtenant of these premises under the provisions of section 18 of the Act.

The brief history of this matter is that the applicant as the owner of the premises in question applied to the Rent Tribunal for the Sub-District of Ulu Kinta, Perak for the recovery of the possession thereof for the purpose of development under the provisions of section 18 of the Act and joined as respondents to this application: (1) the tenant of the premises, Woi Fung Sheng Tim Medical Store (the 1st respondent), (2) New Asia Book Company (the 2nd respondent), a subtenant of the 1st respondent in respect of a portion of the ground floor of the premises, and (3) GT. Fulford (Eastern) Co. Pte. Ltd., a subtenant of the 1st respondent in respect of the whole of the first floor of the premises but who had however vacated the premises when the application was heard by the Rent Tribunal. The rent payable to the applicant by the 1st respondent as the tenant of the premises at the time when the application was made was $160 per month, and the 2nd respondent as the subtenant of the 1st respondent was then paying the latter a rent of $180 per month in respect of its subtenancy of the relevant portion of the ground floor of the premises. The Rent Tribunal made an order in terms of the application for the recovery of possession and, by a majority decision, made an award of compensation on the basis of a total of four years' rental at the rate of $160 per month (the rent for the whole premises then payable to the applicant by the 1st respondent as tenant) in the proportion of $2,880 to the 1st respondent and $4,800 to the 2nd respondent.

The 1st and 2nd respondents were dissatisfied with the quantum of compensation awarded to them respectively and appealed to the Appeal Board against that part of the order of the Rent Tribunal pertaining thereto on the grounds that the Rent Tribunal was not empowered to apportion the rent as it purported to do on an application under section 18 of the Act and that compensation should have been awarded to the 1st respondent on the basis of four years' rental at the rate of $160 per month being the rent then payable by it to the applicant, and to the 2nd respondent on the basis of four years' rental at the rate of $180 per month being the rent then payable by it in respect of its subtenancy. The Appeal Board on February 7, 1976, allowed the appeal and varied the order of the Rent Tribunal, awarding compensation in the sum of $7,680 to the 1st respondent and $8,640 to the 2nd respondent. This was clearly an order awarding the 1st respondent as tenant compensation for a total of four years' rental based on the rent for its tenancy at $160 per month and the 2nd respondent as subtenant compensation based on a total of four years' rental at the rent of $180 per month payable in respect of its subtenancy.

The applicant now complains that the order of the Appeal Board made on February 7, 1976, is wrong in law and applies for *certiorari* to have it quashed on two grounds:

> First, that the maximum amount that the applicant would be required to pay as compensation under section 18(2)(a) of the Act is only four years' rental based on the rent payable by the 1st respondent to the applicant as tenant of the premises at $160 per month and which would accordingly amount to no more than $7,680.
>
> And second, that the Appeal Board was wrong in law in ordering payment of compensation to the 2nd respondent in the sum of $8,640 as such order amounts to approval of what is prohibited under the provisions of section 16(1)(j) of the Act.

Section 15(1) of the Act provides for an appeal to the Appeal Board by any person aggrieved by the decision of the Rent Tribunal, and further provides that any decision made thereon by the Appeal Board shall be final and shall not be questioned in any court. The effect of this statutory provision — a privative or ouster clause contradistinctive to mere finality, a difference at times not sufficiently realised or appreciated as to its operative influence in regard to the availability of *certiorari* and the restricted ground therefor in the case of the former — is purportedly to take away the right to *certiorari*, and counsel on both sides agree, applying and following my judgment in *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)*,[1] that *certiorari* would not however, notwithstanding the privative formula in section 15(1) of the Act, be precluded if there is in fact a manifest defect of jurisdiction in the authority that made the decision or manifest fraud in the party procuring it. The question of manifest fraud does not of course arise in these proceedings.

I would for good measure just add, in briefly summarising the effect of a privative clause such as this, that if a statute provides that an order made by an authority acting under it shall not be questioned in any court, all that is necessary to oust the jurisdiction of the courts is that the authority should have been constituted as required by the statute with jurisdiction in the matter, the parties to the proceedings should be subject and amenable to its jurisdiction, the jurisdiction should be exercised on the grounds mentioned in the statute, and the order made should be within the terms of the statutory provisions. These conditions being satisfied, the ouster is complete even though in applying the provisions of the statute some omission or irregularity not amounting to or resulting in a manifest defect of jurisdiction might have been made or committed by the authority. *Certiorari* would therefore still issue in the face of such an ouster clause but only for a manifest defect of jurisdiction, as the universally accepted rule is *'defectus potestatis nullitas nullitatem'*. The word 'jurisdiction' in the law and doctrine of procedure constitutes and connotes the juridical expression of the right and obligation of an authority on which the law confers jurisdictional functions of taking cognisance of and deciding matters within the limits of its attributes. Hence, 'defect of jurisdiction' means the authority's lack of power to take cognisance of and decide the matter which has been submitted to its decision. 'Manifest', as I said in *Mak Sik Kwong (No. 2)*[1] (at page 179), means no less than self-evident or clear. The question of whether or not there is a manifest defect of jurisdiction will be one for consideration and determination on the particular circumstances of each case as it arises in the light of the principles discussed and postulated in my judgment in the case referred to, and the courts will accordingly have to be ready to sharpen their constitutional knives as and when the occasion demands.

The short point, therefore, that I have to consider is whether or not the construction put by the Appeal Board on the provisions of the Act and in particular section 18 is correct, and if it is not, then whether the order made by it has resulted in a manifest defect of jurisdiction on its part. In this respect it would appear that there are three questions to be considered, namely:

(1) Whether a subtenant of a part of controlled premises is entitled to an award of compensation under the provisions of section 18(2) of the Act on the basis of the rent payable by him in respect of his subtenancy;

(2) Whether it is open to the Rent Tribunal under the provisions of section 18 to make an apportionment of an award of compensation between the tenant and his subtenant or subtenants on an aggregate only of the rental payable by the tenant *per se* in respect of the tenancy of the whole of the controlled premises;

(3) Whether section 16(1)(j) of the Act amounts to a prohibition against a tenant receiving from his subtenant or subtenants rents which exceed in the aggregate by more than ten per centum the rent of the whole premises, thereby precluding an award of compensation under the provisions of section 18 of the Act to a subtenant on the basis of the rent payable by him to the tenant in respect of his subtenancy if it is in excess of the amount so stipulated in section 16(1)(j).

On the first question, section 2 of the Act defines 'tenant' to mean in the case of a subtenancy a subtenant to whom the controlled premises or any part thereof is sublet. 'Premises' is defined therein to mean, *inter alia*, any part of any premises let or sublet separately. Section 18(1) provides for an application to the Rent Tribunal by the landlord of any controlled premises for the recovery of the possession thereof for the purpose of effecting or causing to be effected thereto any development and specifies the necessary prerequisites therefor. It does not refer specifically to an application against the tenant of the whole premises. Section 18(2) prescribes that when an order for the recovery of possession is made the Rent Tribunal shall award to *the tenant* against whom the order is made compensation in terms and on the basis stipulated therein. 'Tenant' is defined specifically in subsection (10) of section 18 to include a subtenant or joint-tenant, and it is of considerable significance and relevance that this definition is explicitly repeated in the provisions of section 18 over and above and notwithstanding the definition enumerated in section

2 which I have already adverted to. The subsection also speaks of an award of compensation to the tenant *against whom the order is made*, and considering this in the light of the definition of 'tenant' in subsection (10) to include a subtenant and the fact that the 1st and 2nd respondents were joined as respondents to the application before the Rent Tribunal and the order of the Rent Tribunal was made against both of them as tenant and subtenant respectively, they must clearly be considered separately entitled to an award of compensation on the basis of the rental then payable by each of them for the purposes of section 18.

In the context of the nature of the tenancy and subtenancy of the 1st and 2nd respondents which were for trade purposes, it is clearly the provisions of paragraph (a) of section 18(2) which apply in this case, and this paragraph specifically provides for the award of compensation in the case of a controlled premises *or part thereof* (and so indeed does paragraph (b) as well). The several parts of the premises might well however be occupied or used for different purposes which would according to the nature of such occupation or user separately attract the application of the provisions of either paragraph (a) or (c) of section 18(2) which provide for different limits for the award of compensation, and this would clearly seem to suggest distinct and individual treatment of the case of the tenant and that of the subtenant or subtenants for the purposes of an award of compensation under that section, and more particularly so in view of the fact that the subsection in question provides for an award to the tenant against whom the order is made and the definition of 'tenant' in subsection (10) of the section to include a subtenant.

Section 18(4) specifies the concomitant provisions consequent on an order for the recovery of possession under that section, and paragraph (b) thereof provides that *every tenant against whom the order is made* shall vacate the premises in question within the time specified therein. The use of the expression 'every tenant' must necessarily connote both tenant and subtenant or subtenants alike in the light of the definition of tenant in subsection (10) to include a subtenant, and indeed the definition itself was necessarily inserted to give clear and unequivocal effect and efficacy to the other provisions of the section and more especially those of subsection (4) which, *inter alia*, require *every tenant* against whom the order is made to comply with the order for the recovery of possession.

Section 18(5) provides for the payment of the compensation awarded when the premises are vacated to *the tenant against whom the order is made*, and subsection (6) prescribes the enforcement procedure for the eviction of *the tenant or tenants* from the premises in the event of their failure to vacate within the time limit stipulated in the order. Subsection (7) refers to the premises vacated by *the tenant or tenants* under the section. These provisions further substantiate the fact that the order for the recovery of possession affects the tenant and subtenants alike if they are parties to the application, and if so there is no logical reason why a subtenant cannot *per se* and in his own right qualify for an award of compensation under the provisions of subsection (2) of section 18 on the basis of the rental he himself is paying in respect of his subtenancy.

It is abundantly clear that the order for the recovery of possession in this case was made against both the 1st and 2nd respondents as tenant and subtenant respectively, and in the light of the several matters I have adumbrated in respect of section 18, compensation under the provisions of subsection (2)(a) must necessarily become payable to both the tenant and the subtenant on the basis of the rent payable by each of them at the time the application was made to the Rent Tribunal.

The second question that arises for consideration is whether the Rent Tribunal could properly apportion the award of compensation, on the basis only of an aggregate of the rent payable by the 1st respondent as tenant, between the 1st and 2nd respondents as it purported to do. Section 20 of the Act is the only provision which empowers apportionment of rent by the Rent Tribunal on application to it where there is a subletting or joint-tenancy and which obviously is not applicable in this matter. A previously determined fair rent of the whole premises under the Act is a necessary prerequisite to an application for apportionment under section 20(1)(a), and the parties agree that there has been no such determination in respect of the premises in question. I would interpose here to observe that the submission of counsel for the 2nd respondent that the applicant could and indeed should have had the fair rent of the whole premises determined under the provisions of section 7 and then applied for apportionment of the fair rent as between the tenant and all the subtenants under section 20(1)(a) before applying for recovery of possession of the premises under section 18 involves the fallacy of *petitio principii* as it only begs the question. Section 21 gives power to the court (defined in section 2 to mean any court of competent jurisdiction) in any proceedings before it for recovery of possession under section 16 of the Act or for ejectment to refer the matter to the Rent Tribunal for the purposes of apportioning the rent as between the premises and any sublet part thereof, whereupon the Tribunal shall proceed as if an application had been made under section 20. It is significant to note the provisions of subsection (2) of section 21 which stipulate that nothing in that section shall apply to any proceedings before the Rent Tribunal instituted under section 18.

It is clear therefore that the Rent Tribunal has no jurisdiction to make any apportionment of the compensation awarded under section 18(2)(a), on the basis only of the rental payable by the tenant, between the tenant and the subtenant in proportion to the rents they were respectively paying, as not only is there no power to that effect and a proper construction of section 18 would not bear out or support any such exercise but it would also appear to be specifically precluded by the very provisions of section 21(2). There is added force in this view if consideration is taken of the fact that where there are a number of subtenants of premises in respect of which an order for the recovery of possession has been made under the provisions of section 18, then an apportionment of compensation based only on the tenant's rental as

between the tenant and all the subtenants would result in no more than a wholly minimal compensation for each of them, thereby defeating and negating the very intention and purpose of the provisions of section 18(2) to award adequate relief by way of monetary compensation to dispossessed tenants and subtenants. Similar complications would also be manifest where, as I have earlier pointed out, the tenant and the subtenant or subtenants do not all occupy or use any part or parts of the controlled premises for trade purposes, as the maximum and minimum limits of the award of compensation under section 18(2) would differ according to whether the provisions of paragraph (a) or (c) thereof would be applicable.

The third question is the effect of the provisions of section 16(1)(j) on the order made by the Appeal Board in respect of the compensation payable to the 2nd respondent as subtenant. Section 16(1)(j) only affords a ground for the recovery of the possession of controlled premises to the landlord against his tenant where the tenant has sublet the whole or part thereof, and reads as follows:

"(j) where the tenant having sublet the controlled premises or part thereof receives in respect of such subletting rents (exclusive of any payment for the services provided by any local authority) for any sublet part of the controlled premises in excess of the fair rent for that part or rents which including the apportioned rental or value of any part of the controlled premises retained by the tenant or not sublet by him exceed in the aggregate by more than ten per centum the rent of the whole premises."

The 1st respondent was receiving at the material time a rent of $180 per month from the 2nd respondent which exceeded in the aggregate by more than ten per centum the rent of $160 per month the former as the tenant was paying to the applicant for the whole premises, thus coming within the ambit of the second limb of paragraph (j).

The second limb of section 16(1)(j) does not amount to any prohibition as such and it is in the discretion of the landlord whether or not to proceed to seek recovery of the possession of the premises from the tenant by relying on the provisions of this paragraph; it is not mandatory. The rent received by the tenant from his subtenant in excess of the limit specified in this limb of the paragraph in question is not illegal and it would certainly not be open to the subtenant to recover any such excess paid to the tenant. Any such subtenancy is not illegal or prohibited *per se*, the paragraph in question only affording, I repeat, a ground for the recovery of possession to the landlord, and that this is indeed so would appear to be absolutely clear from the provisions of section 17 of the Act in that such a subtenant is not included in the specific provisions of paragraph (a) of section 17(1). Briefly, section 17(1) provides that an order or judgment for the recovery of possession obtained against a tenant of controlled premises under section 16 shall not be enforceable against any subtenant of such tenant unless the court is satisfied that such tenant was prohibited by the terms of his tenancy from subletting or that such subtenant has used the premises for illegal or immoral purposes, and such subtenant has been made a party to the proceedings or has had an opportunity of being heard. There is no mention whatsoever of a subtenant whose rent exceeds the limits set out in section 16(1)(j), and furthermore any such rents charged by the tenant within the meaning of the second limb of section 16(1)(j) do not come within the penalty clause in section 22 of the Act which provides for a penalty for charging excessive rent and in addition thereto forfeiture of the tenancy.

I am therefore clearly of the view that there is no substance or merit either in the second ground of complaint against the decision of the Appeal Board raised by the applicant in the statutory statement annexed to her application for leave in these proceedings.

I accordingly find that the decision of the Appeal Board is perfectly proper and valid and made within jurisdiction and no grounds exist for me to hold that there has been a defect of jurisdiction, let alone any manifest defect, to justify the remedy and relief sought.

The application must accordingly fail, and I so order.

Application failed.

Solicitors: *Kean Chye & Sivalingam; Liew Why Hone & Co.*